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No. 94-455

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

TYSON JOHNSON, ROBERT DEEVEY, and JOHN PAYNE,

Petitioners,

v.

HOUSTON JONES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE CITY OF CHICAGO AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether, in an action under 42 U.S.C. § 1983, the denial of a public official's motion seeking summary judgment on qualified immunity grounds because the plaintiff failed to adduce any evidence showing wrongful conduct may be challenged in an interlocutory appeal.

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INTEREST OF THE *AMICUS CURIAE*

The City of Chicago is by far the largest city in the Seventh Circuit and has by far the largest municipal work force. The City therefore has more to lose than any other jurisdiction from the Seventh Circuit's unwarranted imposition in this case of a radical limitation on the right to immediate appeal of the district court's rejection of the defense of qualified immunity before a public official is subjected to the burdens of discovery and trial. In fact, the decision below simply follows a ruling in a case involving the City of Chicago in which the Seventh Circuit made up this rule limiting appeals. *Elliott v. Thomas*, 937 F.2d 338 (7th Cir. 1991), cert. denied, 112 S. Ct. 1242 (1992). Because the court of appeals' decision in

this case has a direct and substantial effect on the City of Chicago, we submit this brief to urge the Court to grant the petition for a writ of certiorari.

ARGUMENT

This Court has specifically held that "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." *Mitchell v. Forsyth,* 472 U.S. 511, 530 (1985). In *Elliott v. Thomas,* 937 F.2d 338 (7th Cir. 1991), cert. denied, 112 S. Ct. 1242 (1992), the Seventh Circuit held that *Mitchell* does not authorize an appeal from a district court's "refusal to grant summary judgment to a defendant who denies committing any wrong." 937 F.2d at 340. The court stated that "[i]t would extend *Mitchell* well beyond its rationale to accept an appeal containing nothing but a factual issue" and asserted that it was joining other courts of appeals that had held that *Mitchell* does not authorize an appeal to argue 'we didn't do it.'" 937 F.2d at 342. According to the court, "the interlocutory appeal to vindicate the right not to be tried is unavailable when there is no legal uncertainty; there is no separate 'right not to be tried' on the question whether the defendants did the deeds alleged; that is *precisely* the question for trial." *Id.* at 341 (emphasis in original). Accordingly, the court dismissed an interlocutory appeal by the City of Chicago for lack of jurisdiction. *Id.* at 343.

This limitation makes no sense. The defense of qualified immunity assists in ensuring that public official defendants need not be distracted from their duties and subject themselves to the rigors of discovery and trial in insubstantial cases. See *Harlow v. Fitzgerald,* 457 U.S. 800, 814 (1982). Under *Elliott,* a defendant who admits engaging in misconduct, but who argues that, at the time of such misconduct, it had not yet been clearly established

that such misconduct violated the Constitution, obtains the protection of an interlocutory appeal before he must stand trial; however, a defendant who denies engaging in any misconduct, and who argues that the plaintiff has no genuine evidence of misconduct, has no right to an interlocutory appeal. Such a rule is plainly perverse.

It is also wrong. Both *Mitchell* and *Anderson v. Creighton*, 483 U.S. 635 (1987), make clear that a public official asserting qualified immunity "is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed [acts that violate clearly established law]." *Mitchell*, 472 U.S. at 526; see *Anderson*, 483 U.S. at 646 n.6. And *Harlow* makes clear why this is so: qualified immunity protects the official whose actions did not violate clearly established law. 457 U.S. at 818. Nowhere has this Court ever indicated that it matters whether the reason the defendant did not violate clearly established law is that the law was not clearly established at the time that he acted or that he simply did not do the things the plaintiff alleges he did. Indeed, in *Siegert v. Gilley*, 500 U.S. 226 (1991), the Court held that one way a defendant can prevail on qualified immunity grounds in an interlocutory appeal is to show that he is entitled to win on the merits. *Id.* at 232. There is thus no incompatibility between the two kinds of qualified immunity defenses, and certainly no reason to treat them differently for purposes of appellate jurisdiction.

Contrary to the court's claim in *Elliott*, the result below has been expressly rejected in at least five other circuits, as the petition thoroughly explains. See *Burgess v. Pierce County*, 918 F.2d 104 (9th Cir. 1990); *Unwin v. Campbell*, 863 F.2d 124 (1st Cir. 1988); *Turner v. Dammon*, 848 F.2d 440 (4th Cir. 1988); *DeVargas v. Mason & Hanger-Silas Mason Co.*, 844 F.2d 714 (10th Cir. 1988); *Wright v. South Arkansas Regional Health Center*, 800 F.2d 199 (8th Cir. 1986). See also *Martin v. D.C. Metropolitan Police Department*, 812 F.2d 1425 (D.C.

Cir.), vacated in part and rehearing en banc granted, 817 F.2d 144, original opinion reinstated, 824 F.2d 1240 (1987) (holding that plaintiff's evidence was insufficient to warrant denial of motion for summary judgment on qualified immunity grounds).

Prior to *Elliott*, two other circuits had entertained appeals from what *Elliott* calls a "we didn't do it" qualified immunity defense, but they have been infected by the error of *Elliott* and they, too, now refuse such appeals. Compare *Brown v. Grabowski*, 922 F.2d 1097 (3d Cir. 1990), cert. denied, 501 U.S. 1218 (1991), and *Ramirez v. Webb*, 835 F.2d 1153 (6th Cir. 1987) (both entertaining appeals in "we didn't do it" cases), with *Giuffre v. Bissell*, 31 F.3d 1241 (3d Cir. 1994) (holding that such a defense is not cognizable as a qualified immunity defense), and *Stone v. Holzberger*, 23 F.3d 408 (6th Cir. 1994) (holding that there is no right of interlocutory appeal for such defenses).

The limitation of qualified immunity appeals is also of considerable practical importance. Our police officers are frequently defendants in civil rights cases, and other City officials are also repeatedly sued. So are federal officials and officials from every state and local government in this circuit. Until the Seventh Circuit's decision in *Elliott*, the denial of qualified immunity was, in this circuit as elsewhere, immediately appealable under *Mitchell*, and when a plaintiff had adduced no genuine evidence of misconduct, the public officials could be spared the burdens of trial by taking an interlocutory appeal. Now, in this circuit—and in reliance on that decision, in the Third and Sixth Circuits as well—federal, state, and local officials may not immediately appeal the district court's denial of qualified immunity in cases where they deny committing any illegal acts. The holding in these cases results in protracted litigation and diverting busy public officials from more important tasks. See *Davis v. Scherer*, 468 U.S. 183, 194 (1984); *Harlow*, 457 U.S. at 814. Yet, under these cases, even specious accusations by a plaintiff with every reason to engage in vexatious litigation—say a

prisoner convicted by the police work of the defendants he sues—must go to trial. Such a result is flatly at odds with this Court's injunction to "resolv[e] immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant,* 502 U.S. 224 (1991) (per curiam).

Worst of all is the pointless waste of resources on the question whether there is appellate jurisdiction under the obscure distinction drawn by *Elliott* and its progeny. In the time that the courts have spent on the task of determining whether to entertain an appeal in a particular case —that is, whether the qualified immunity defense rests on the claim that the defendant "acted in the shadow of legal uncertainty," *Elliott,* 937 F.2d at 342, or rather that he did nothing wrong by any standard—they likely could have reached the merits of the public official's claim, and thus freed him from the burdens of discovery and trial. Indeed, after the Seventh Circuit dismissed our appeal in *Elliott* and this Court denied the petition for certiorari, we went to trial and prevailed.

Review by this Court is amply warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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